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Darius Hoindi v Thomas Hinjiang & Ors

B HIGH COURT (KOTA KINABALU) — CASE NO BKI-22NCVC-47/7 OF 2022
LIM HOCK LENG J
16 OCTOBER 2024

C *Native Law and Custom — Land dispute — Deceased bequeathed land to nephew through will — Claim of land by deceased only child ('plaintiff') — Plaintiff obtained order ('Jadual Tiga') from Native Court under Administration of Native and Small Estates Ordinance (Sabah) (Cap 1) — Deceased's will not presented at hearing of Jadual Tiga — Whether Jadual*
D *Tiga obtained without considering a valid will void ab initio — Whether there was failure to adhere to procedural requirements under Administration of Native and Small Estates Ordinance (Sabah) (Cap 1) ('the ANSEO') — Whether absence of proper notice invalidated Jadual Tiga — High Court granted grant of probate under Probate and Administration Ordinance (Sabah) (Cap 109) to deceased's*
E *nephew — Whether High Court's order prevailed over Native Court's order (Jadual Tiga)*

The deceased, before passing away in 2013, had bequeathed a parcel of land ('the land') to his nephew, the first defendant, under a will made on
F 26 November 2012. The plaintiff, the only child of the deceased, had lodged two caveats over the land namely on 21 December 2009 and on 20 September 2012. The second caveat was lodged on the basis that, inter alia, the deceased had allegedly reported the loss of the title deed. On 21 December 2012, a hearing was held by the assistant collector of land revenue ('ACLR') who
G ordered the second caveat to be removed at the instance of the plaintiff's father, the deceased. The plaintiff appealed against the decision removing his caveat to the Director of Lands and Surveys under s 41 of the Land Ordinance (Cap 68) but the appeal was dismissed. On 13 August 2013, the plaintiff obtained an order from the Mahkamah Anak Negeri Penampang pursuant to the
H Administration of Native and Small Estates Ordinance (Sabah) (Cap 1) ('the ANSEO'). That order ('Jadual Tiga') gave him administration and distribution rights over the deceased's estate, in particular, for him to inherit the land. The deceased's will be not produced at the hearing for the Jadual Tiga. On 10 June 2015, the first defendant was issued a grant of probate by the High Court at
I Kota Kinabalu pursuant to the Probate and Administration Ordinance (Sabah) (Cap 109) in his favour. The Jadual Tiga was not produced at the hearing. Although the plaintiff had obtained the Jadual Tiga earlier, he was not able to transfer the land because the title deed was in the hands of the first defendant. The first defendant then applied for leave to take out an application for judicial

review to quash the decision of the Native Court in issuing the Jadual Tiga. That application was dismissed. In due course, the Land Office Penampang acted on the grant of probate and the land was transferred to the first defendant who sold the land to the second defendant about a year later. The plaintiff, therefore, brought an action against the first defendant for various declarations and damages, the second defendant to surrender the title deed for the land, and the third and fourth defendants to regularise all endorsements on the title deed in favour of the plaintiff. On the contrary, the first defendant sought a declaration by way of counterclaim so that the issue of the Jadual Tiga may be laid to rest or heard together with the very proceedings that the plaintiff had initiated to set aside the grant of probate and to affirm the validity of the Jadual Tiga.

Held, dismissing the plaintiff's claim; allowing the first defendant's counterclaim:

(1) It was unclear whether the plaintiff was averring that the will was not executed by the deceased, or that the deceased lacked the testamentary capacity to understand the contents. It was doubtful if there could be a cause of action based on the plaintiff's belief as an only child, or suspicion grounded on the first defendant allegedly taking the deceased to a mental institute though the deceased had no history of mental illness. It was equally doubtful that there could be a cause of action based on an averment that there could have been an exertion of undue influence on the deceased if at all the will was signed by him. Significantly, there was no relief sought for the setting aside of the will (see paras 26–29).

(2) The fact that the deceased excluded the plaintiff, his only child, from his will is on its own insufficient to hold that he lacked testamentary capacity. The deceased had prior to making of his will, successfully acted to remove the plaintiff's caveat on the land in respect of which there was a hearing by the ACLR. There was also evidence to show that the plaintiff had testamentary capacity to make the will. They were all independent witnesses who had no relationship with the deceased. Also, there was no evidence of any disorder of the mind or insane delusion which would influence the deceased's will to dispose of his property. Further, the will was clearly extant and it had been signed by the deceased. It was not a forgery. Thus, 'the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will' had not been discharged by the plaintiff. The first defendant, however, had discharged the burden of proving its due execution by and testamentary capacity of the deceased (see paras 47, 49–50, 52 & 62).

(3) In considering whether the plaintiff could apply for the Jadual Tiga, since the first defendant was named as the executor in the will, the plaintiff clearly was not a person who could apply for the Jadual Tiga under s 3 of

A the Administration of Native and Small Estates Ordinance. He could not then ask for declaratory reliefs to uphold the Jadual Tiga. The Jadual Tiga was wrongfully obtained and it was void ab initio (see para 74).

(4) Since it was more probable than not that the Jadual Dua was not issued or it was not exhibited on the notice board, it would be unjust for the first defendant to lose his rights to the land willed to him. The court could not lose sight of the fact that the will was executed by the deceased as a matter of fact, and he had testamentary capacity to do so. The will was not vitiated by undue influence or in any other way. The Jadual Tiga which dealt with the deceased's estate on the basis that he died intestate could not stand in the way of the will (see paras 110–112).

(5) While the court was not persuaded by the first defendant's arguments on the Native Court's purported failure to consider the magnitude of the estate; or that the Jadual Tiga ought to be set aside because the first defendant did not actually receive or know of the Jadual Dua, it agreed with the first and second defendants' contention that the plaintiff did not properly obtain the Jadual Tiga as: (a) he did not fall within the class of persons who could apply for the Jadual Tiga under s 3 of the Administration of Native and Small Estates Ordinance, and (b) the Jadual Dua was not issued and even if it was, it was not exhibited on the notice board as required, thus depriving the first defendant of the opportunity of being heard and producing the will to contradict the plaintiff's claim as the beneficiary of the land (see para 156).

(6) The plaintiff's action was defeated by the plea of limitation put up by the first and second defendants. The plaintiff's action was dismissed as against all the defendants. The first defendant's counterclaim was allowed, as a result of which he was granted a declaration that the Jadual Tiga was invalid and was to be set aside, and the defendant by counterclaim was to deliver the Jadual Tiga to the Mahkamah Anak Negeri for cancellation (see paras 157 & 159–160).

[Bahasa Malaysia summary

Sebelum si mati meninggal dunia pada tahun 2013, si mati telah mewasiatkan sebidang tanah ('tanah tersebut') kepada anak saudaranya, iaitu defendan pertama, melalui satu wasiat bertarikh 26 November 2012. Plaintif, yang merupakan satu-satunya anak si mati, telah mendaftarkan dua kaveat ke atas tanah tersebut iaitu pada 21 Disember 2009 dan 20 September 2012. Kaveat kedua didaftarkan atas alasan antaranya si mati telah melaporkan kehilangan geran hakmilik. Pada 21 Disember 2012, satu pendengaran telah diadakan oleh penolong pemungut hasil tanah ('PPHT') yang kemudiannya mengarahkan kaveat kedua itu dibatalkan atas permohonan bapa plaintif, iaitu si mati sendiri. Plaintif telah merayu terhadap keputusan pembatalan kaveat tersebut kepada Pengarah Tanah dan Ukur di bawah s 41 Ordinan Tanah (Cap

68), tetapi rayuannya ditolak. Pada 13 Ogos 2013, plaintif telah memperoleh satu perintah daripada Mahkamah Anak Negeri Penampang menurut Ordinan Pentadbiran Harta Pusaka Kecil dan Anak Negeri (Sabah) (Cap 1) ('ANSEO'). Perintah tersebut ('Jadual Tiga') memberikan hak kepada plaintif untuk mentadbir dan mengagihkan harta pusaka si mati, khususnya untuk mewarisi tanah tersebut. Wasiat si mati tidak dikemukakan ketika pendengaran Jadual Tiga. Pada 10 Jun 2015, defendan pertama telah diberikan satu geran probet oleh Mahkamah Tinggi Kota Kinabalu menurut Ordinan Probet dan Pentadbiran (Sabah) (Cap 109). Jadual Tiga tidak dikemukakan semasa pendengaran tersebut. Walaupun plaintif telah lebih awal memperoleh Jadual Tiga, dia tidak dapat memindahkan tanah kerana geran hakmilik dipegang oleh defendan pertama. Defendan pertama kemudian memohon kebenaran untuk memfailkan semakan kehakiman bagi membatalkan keputusan Mahkamah Anak Negeri dalam mengeluarkan Jadual Tiga, tetapi permohonan tersebut ditolak. Akhirnya, Pejabat Tanah Penampang bertindak atas geran probet tersebut dan tanah telah dipindahkan kepada defendan pertama yang kemudiannya menjual tanah itu kepada defendan kedua kira-kira setahun kemudian. Oleh itu, plaintif telah memfailkan tindakan terhadap defendan pertama bagi pelbagai deklarasi dan ganti rugi, menuntut defendan kedua menyerahkan geran hakmilik tanah, serta memohon defendan ketiga dan keempat membetulkan semua endorsmen dalam geran tersebut bagi kepentingan plaintif. Sebaliknya, defendan pertama melalui tuntutan balas telah memohon deklarasi supaya isu berkaitan Jadual Tiga dapat diputuskan muktamad atau dibicarakan bersama dalam prosiding yang dimulakan oleh plaintif untuk mengenepikan geran probet dan mengesahkan keesahan Jadual Tiga.

Diputuskan, menolak tuntutan plaintif; membenarkan tuntutan balas defendan pertama:

(1) Adalah tidak jelas sama ada plaintif ingin berhujah bahawa wasiat tersebut tidak ditandatangani oleh si mati, atau bahawa si mati tidak mempunyai kemampuan mewasiat untuk memahami kandungan wasiat tersebut. Adalah meragukan sama ada boleh wujud suatu kausa tindakan hanya berdasarkan kepercayaan plaintif sebagai anak tunggal, atau syak wasangka yang berpunca daripada dakwaan bahawa defendan pertama telah membawa si mati ke sebuah institusi mental walaupun si mati tidak mempunyai sejarah penyakit mental. Juga meragukan sama ada wujud suatu kausa tindakan berdasarkan dakwaan bahawa mungkin terdapat pengaruh tidak wajar terhadap si mati sekiranya wasiat itu benar-benar ditandatangani olehnya. Lebih penting, tiada relif yang dituntut bagi mengenepikan wasiat tersebut (lihat perenggan 26–29).

(2) Fakta bahawa si mati telah mengecualikan plaintif, satu-satunya anaknya, daripada wasiatnya, dengan sendirinya adalah tidak mencukupi untuk menyimpulkan bahawa dia tidak mempunyai kemampuan mewasiat.

Sebelum membuat wasiat tersebut, si mati telah berjaya bertindak untuk membatalkan kaveat plaintif ke atas tanah yang berkenaan, yang mana telah didengar oleh PPHT. Terdapat juga keterangan yang menunjukkan bahawa si mati mempunyai kemampuan mewasiat untuk wasiat tersebut. Semua saksi adalah saksi bebas yang tidak mempunyai sebarang hubungan dengan si mati. Selain itu, tiada keterangan mengenai sebarang gangguan minda atau delusi gila yang boleh mempengaruhi kehendak si mati dalam melupuskan hartanya. Tambahan pula, wasiat tersebut jelas wujud dan telah ditandatangani oleh si mati. Ianya bukanlah suatu pemalsuan. Justeru, 'tanggungjawab untuk membuktikan sebarang unsur luar yang menjejaskan seperti pengaruh tidak wajar, penipuan atau pemalsuan terletak kepada pihak yang mencabar wasiat tersebut' tidak dipenuhi oleh plaintif. Sebaliknya, defendan pertama telah memenuhi beban untuk membuktikan pelaksanaan sewajarnya oleh si mati serta kemampuan mewasiatnya (lihat perenggan 47, 49–50, 52 & 62).

(3) Dalam menimbangkan sama ada plaintif boleh memohon bagi Jadual Tiga, memandangkan defendan pertama telah dinamakan sebagai wasi dalam wasiat tersebut, maka jelas plaintif bukanlah seorang yang layak memohon Jadual Tiga di bawah s 3 Administration of Native and Small Estates Ordinance. Oleh itu, plaintif tidak boleh memohon perintah pengisytiharan untuk menguatkuasakan Jadual Tiga tersebut. Jadual Tiga itu telah diperoleh secara tidak sah dan adalah batal secara ab initio (lihat perenggan 74).

(4) Oleh kerana lebih berkemungkinan bahawa Jadual Dua tidak pernah dikeluarkan atau tidak dipamerkan di papan kenyataan, adalah tidak adil untuk defendan pertama kehilangan haknya ke atas tanah yang diwasiatkan kepadanya. Mahkamah menegaskan bahawa wasiat tersebut telah benar-benar dibuat oleh si mati dan si mati mempunyai kemampuan mewasiat untuk berbuat demikian. Wasiat itu juga tidak dipengaruhi oleh sebarang pengaruh tidak wajar atau perbuatan lain. Oleh itu, Jadual Tiga yang memperuntukkan pentadbiran harta pusaka seolah-olah si mati meninggal tanpa wasiat tidak boleh mengatasi kewujudan wasiat tersebut (lihat perenggan 110–112).

(5) Walaupun mahkamah tidak menerima hujahan defendan pertama mengenai kegagalan Mahkamah Anak Negeri untuk meneliti saiz harta pusaka yang besar atau Jadual Tiga wajar diketepikan kerana defendan pertama tidak menerima atau mengetahui tentang Jadual Dua, mahkamah tetap bersetuju dengan hujahan defendan pertama dan kedua bahawa plaintif tidak memperoleh Jadual Tiga secara sah. Hal ini demikian kerana plaintif tidak tergolong dalam kategori orang yang dibenarkan memohon Jadual Tiga menurut s 3 Administration of Native and Small Estates Ordinance. Selain itu, Jadual Dua tidak pernah

dikeluarkan dan walaupun ianya dikeluarkan, ianya tidak dipamerkan di papan kenyataan sebagaimana yang dikehendaki oleh undang-undang. Keadaan ini telah menafikan hak defendan pertama untuk didengar serta mengemukakan wasiat bagi menyangkal tuntutan plaintif sebagai benefisiari tanah tersebut (lihat perenggan 156).

(6) Tindakan plaintif telah digagalkan oleh pembelaan had masa yang dikemukakan oleh defendan pertama dan kedua. Tindakan plaintif terhadap semua defendan telah ditolak. Sebaliknya, tuntutan balas defendan pertama telah dibenarkan, dan diberikan suatu perisytiharan bahawa Jadual Tiga adalah tidak sah dan hendaklah diketepikan. Plaintif sebagai defendan dalam tuntutan balas juga diarahkan untuk menyerahkan Jadual Tiga tersebut kepada Mahkamah Anak Negeri bagi tujuan pembatalan (lihat perenggan 157 & 159–160).]

Cases referred to

Assistant Collector of Land Revenues & Ors v Alfeus bin Yahsu & Anor and another appeal [2016] MLJU 1662; [2016] 7 CLJ 848, CA (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Banks v Goodfellow [1870] LR 5 QB 549, QBD (refd)

Borneo Samudera Sdn Bhd v Uttoh Ajak & Ors; The Assistant Collector of land Revenue, Kinabatangan & Ors (Third Parties) [2014] CLJU 635, HC (refd)

CH Choo & Sons Sdn Bhd v Wong Nyuk Shing @ Wong Teck Tsin [2010] 9 MLJ 176, HC (refd)

CIMB Islamic Trustee Bhd (as the administrator of the estate of Hussein bin Noor, deceased) v Pendaftar Hakmilik Negeri Selangor & Ors [2021] MLJU 2890; [2022] 4 CLJ 499, CA (refd)

Darius Hoindi v Thomas Hinjiang & Ors [2020] MLJU 1106; [2020] CLJU 1318, HC (refd)

Director of Forests, Sarawak & Anor v Balare Jabu & Ors (suing on behalf of themselves and all other proprietors, occupiers, holders and claimants of native customary rights land (NCR) at and around Long Lamai, Ulu Baram, Sarawak) and another appeal [2018] supp MLJ 169; [2012] 7 CLJ 685, FC (refd)

Ensui Gudul @ Godol v Suin @ Abdul Samad bin Dongkiris & Ors [2011] 3 MLJ 498; [2010] CLJU 943, HC (refd)

Eu Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 37, FC (refd)

Goh Beng Li @ Angeline binti Umpu v Goh Beng Chu @ Mariana binti Umpu [2018] MLJU 977; [2019] 1 SSLR 339, CA (refd)

Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors [2014] 1 MLJ 794, CA (refd)

Loo Keck Leong v PP [1992] 2 MLJ 177; [1992] 3 CLJ 1332, SC (refd)

Majlis Perbandaran Seberang Perai v Tenaga Nasional Bhd [2005] 1 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Montreal Street Rly Co v Normandin [1917] AC 170, PC (refd)
Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374, FC (refd)
Ng Kon Yu v Sakim bin Saiking & Ors [2001] 4 MLJ 140; [2001] CLJU 37, HC (refd)
Rajang Plywood Sawmill Sdn Bhd v Jangkar Enterprise Sdn Bhd [2008] MLJU 377; [2008] CLJU 405, HC (refd)
Randolph Yap Pow Kong & Anor v Yvonne Yap Yoke Sum (f) & Ors [2011] 3 MLJ 556; [2010] CLJU 684, HC (refd)
Ridge v Baldwin and others [1963] 2 All ER 66, HL (refd)
Saadian bt Karim v Ong Ting Chai [1996] 5 MLJ 646; [1996] CLJU 96, HC (refd)
Saripah Kulah & Ors v Sarabal Alian & Ors [2013] 2 CLJ 1153, HC (refd)
Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609; [2015] 2 CLJ 1037, FC (refd)
Tan Geok Lan v La Kuan @ Lian Kuan [2004] 3 MLJ 465, FC (refd)
The King v the Chancellor, Masters, and Scholars of the University of Cambridge (1723) 92 ER 370; [1723] 88 ER 111, KBD (refd)
The Liverpool Borough Bank v Turner [1860] 45 ER 715; [1860] 2 De GF & J 502 (folld)
Three Petitions For Letters of Administration, Re [1972] 1 MLJ 244 (refd)

Legislation referred to

Administration of Native and Small Estates Ordinance (Cap 1) ss 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23
Evidence Act 1950 ss 102, 103, 114(e), (f)
Land Ordinance (Cap 68) ss 13, 41
Limitation Act 1953
Limitation Ordinance (Cap 72) Schedule, items 73, 112
Native Courts Enactment 1992 s 16
Probate and Administration Ordinance (Cap 109)
Public Authorities Protection Act 1948 ss 2, 22
Wills Ordinance (Cap 158) s 1(3)

Trevor Maringking (Maringking & Co) for the plaintiff.
Emmie Martin (Miram & Co) for the first defendant.
Chang Vun Shin (Chang & Wong Partners) for the second defendant.
Dulce Milus Majawit (Sabah State Attorney-General's Chambers) for the third and fourth defendants.

Lim Hock Leng J:

THE BROAD ISSUES, PARTIES AND DISPUTE

[1] Broadly, the case at hand concerns, inter alia, orders made by a Native Court and the High Court concerning the estate of a native who died testate, whether one order is to prevail over the other, and whether the order of the Native Court may be set aside or attacked in proceedings brought for that purpose.

[2] The case also concerns the role of pleadings and the statements of agreed issues, and the issue whether the will could be impugned notwithstanding the manner in which the alleged vitiating factor of undue influence was pleaded, and the deceased's alleged lack of testamentary capacity.

[3] Additionally, there is the issue whether the plaintiff's claim is defeated by the plea of limitation by the first and second defendants, notwithstanding that one of the plaintiff's claims was for declarations.

[4] The plaintiff is the only child and son of the late Joanes Hoindi Asing @ Hindi ('the deceased').

[5] The deceased had bequeathed a parcel of land held under NT 213101234 ('the land') to his nephew, the first defendant, under a will made on 26 November 2012.

[6] The deceased passed away on 22 May 2013.

[7] The land is the subject matter of the dispute.

[8] The land was sold by the first defendant to the second defendant pursuant to a sale and purchase agreement dated 18 September 2017. The transfer of the land was registered on 28 September 2017. The third and fourth defendants were added as they facilitated both transfers.

[9] The laws in Sabah touching on the issues in this case are the:

(a) Administration of Native and Small Estates Ordinance (Sabah Cap 1);

(b) Wills Ordinance (Sabah Cap 158); and

(c) Probate and Administration Ordinance (Sabah Cap 109).

THE PLAINTIFF'S CAVEATS

[10] Long before the dispute started, the plaintiff had, on 21 December 2009, lodged a caveat over the land. In Sabah, caveats have a lifespan of three years.

[11] On 20 September 2012, the plaintiff lodged another caveat over the land on the basis that, inter alia, the deceased had allegedly reported the loss of the title deed whereas he had the title deed in hand, he had cultivated the land, his father was 92 years old and there were parties who had tried to influence his father to sell the land, and he was the heir to the land.

[12] On 21 December 2012, there was a hearing held by the assistant collector of land revenue ('the ACLR') who ordered the second caveat to be removed at the instance of his father, the deceased.

[13] The plaintiff appealed — against the decision removing his caveat — to the director of lands and surveys under s 41 of the Land Ordinance (Cap 68).

[14] The plaintiff's appeal was dismissed by the deputy director of lands and surveys.

THE CONFLICTING ORDERS

[15] On 13 August 2013, the plaintiff obtained an order from the *Mahkamah Anak Negeri Penampang* pursuant to the Administration of Native and Small Estates Ordinance. That order — commonly referred to as the *Jadual Tiga* — gave him administration and distribution rights over the deceased's estate, in particular, for him to inherit the land. There is no evidence the deceased's will was produced at the hearing for the *Jadual Tiga*.

[16] On 10 June 2015, the first defendant was issued a grant of probate by the High Court at Kota Kinabalu pursuant to the Probate and Administration Ordinance (Sabah Cap 109) in his favour. The *Jadual Tiga* was not produced at the hearing.

[17] There are thus two conflicting orders concerning the administration and distribution of the deceased's estate.

[18] Although the plaintiff had obtained the *Jadual Tiga* earlier, he was not able to transfer the land because the title deed was in the hands of the first defendant.

[19] On 17 June 2015, the first defendant applied for leave to take out an application for judicial review to quash the decision of the Native Court in issuing the *Jadual Tiga*. That application was dismissed.

[20] In due course, the Land Office Penampang acted on the grant of probate and the land was transferred to the first defendant on 6 October 2016 who, as mentioned earlier, sold the land to the second defendant about a year later.

[21] By an originating summons taken out in April 2019, the plaintiff claimed that the grant of probate ought to be set aside as the first defendant had deceived the High Court into granting the order through the non-disclosure of the subsisting *Jadual Tiga*. Justice Wong Siong Tung disallowed the plaintiff's application for summary disposal of the originating summons, as he was of the view that there were substantial disputes of fact, including the issue whether notice had been given to the first defendant for the *Jadual Tiga* hearing, and whether the *Jadual Tiga* was in breach of the rules of natural justice and thus void ab initio. His Lordship ordered the parties to exchange pleadings. See *Darius Hoindi v Thomas Hinjiang & Ors* [2020] MLJU 1106; [2020] CLJU 1318.

[22] That was how the action herein begun. The plaintiff sued the first defendant for various declarations and damages, the second defendant to surrender the title deed for the land, and the third and fourth defendants to regularise all endorsements on the title deed in favour of the plaintiff. He also sought interest and costs.

THE PLAINTIFF'S PLEADED CASE, AND AIT 1/AIT 2: ISSUES

[23] So far as may be discerned from the statement of claim which included evidence and arguments, the plaintiff's cause of action as against the first defendant appears to be that, as the deceased's only child, 'the plaintiff has *no reason to believe* that his late father executed the said will bequeathing all his properties to the first defendant instead to him or to his mother especially when the deceased was already frail at 94 years old in year 2012 when he allegedly made the said will'. See BP, p 4, para 12.

[24] The plaintiff also pleaded that the first defendant brought the deceased to a mental institute in late 2012, though the deceased had no known history of mental illness. See BP, p 4, para 13.

[25] The plaintiff then averred: 'As such, the plaintiff pleads that the circumstances regarding the execution of the said will are highly suspicious and that the first defendant could have exerted undue influence on the deceased if

the alleged will was indeed executed'. See BP, p 4, para 14.

[26] It seems unclear whether the plaintiff is averring that the will was not executed by the deceased, or that the deceased lacked the testamentary capacity to understand the contents.

[27] It is doubtful if there can be a cause of action based on the plaintiff's belief as an only child, or suspicion grounded on the first defendant allegedly taking the deceased to a mental institute though the deceased had no history of mental illness.

[28] It is equally doubtful that there can be a cause of action based on an averment that there could have been an exertion of undue influence on the deceased if at all the will was signed by him.

[29] Significantly, there is no relief sought for the setting aside of the will.

[30] It is also significant that the statement of issues to be tried as between the plaintiff and the first defendant ('AIT 1') does not include any issues on whether the will was executed by the deceased, or whether the deceased lacked testamentary capacity when he signed it.

[31] Instead, the plaintiff agreed that the following issues be determined by the court. They are as follows:

(a) whether the plaintiff's application and the granting of the *Jadual Tiga* dated 13 August 2013 by the Native Court Penampang was null and void ab initio;

(b) if the said *Jadual Tiga* dated 13 August 2013 is valid, whether the High Court is seised with jurisdiction to grant the probate dated 10 June 2015;

(c) whether the Native Courts or the civil courts, by virtue of their jurisdiction to hear probate matters, have the power to override or disregard the intentions of the testator as manifested in the will dated 26 November 2012;

(d) whether the grant of probate dated 10 June 2015 issued by the High Court overrides the purported *Jadual Tiga* dated 13 August 2013 (without any will) issued by the Native Court;

(e) whether the first defendant as the executor is vested with the power to hand over the said property, land title No 213101234 to the beneficiary in accordance with the will of the deceased; and

(f) whether the second defendant is a bona fide purchaser of the said property, land title No 213101234.

[32] Similarly, there was no issue between the plaintiff and the second defendant (who claimed to be a bona fide purchaser of the land for value) about whether the will was in fact executed or whether the deceased had testamentary capacity at the material time. See AIT 2. There were common issues raised by the first and second defendants in relation to the plaintiff, although the second defendant further contended that he is a bona fide purchaser for value.

[33] The third and fourth defendants did not take sides and agreed to be bound by the decision of the court. They took no further steps after entering appearance.

[34] It is clear that while the plaintiff alluded to or obliquely suggested that the will was questionable, there was no cause of action pleaded *and* there was also no prayer for the setting aside of the will.

[35] It is equally clear that the plaintiff's pleaded case rests on para 15 of its statement of claim which reads as follows:

> In any event, by virtue of Section 1(3) of the Wills Ordinance (Sabah Cap 158) the deceased is not able to dispose of his property by will in a manner contrary to law or custom applicable at the time of his death.

[36] Since AIT 1 and AIT 2 did not require the court to determine whether the will was validly executed or the deceased had testamentary capacity when he made the will, all the innuendoes about the will are no more than red herrings.

[37] In *CH Choo & Sons Sdn Bhd v Wong Nyuk Shing @ Wong Teck Tsin* [2010] 9 MLJ 176, VT Singham J made it clear that the court will determine the outcome of a case based on the parties' pleaded case, the statement of agreed facts and statement of issues for trial.

[38] In *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465, it was held by the Federal Court that where the parties have reached an agreement on the mode and manner of determining the issues which are the subject matter of the proceedings, they are bound by their agreement.

[39] There was a statement of agreed facts and issues to be tried vide encl 98 in *Rajang Plywood Sawmill Sdn Bhd v Jangkar Enterprise Sdn Bhd* [2008] MLJU 377; [2008] CLJU 405. In that case, David Wong J (as he then was) held:

> The legal effect of encl 98, in my view, is that the parties are bound by what they have stated there and the court in turn must base its decision on what have been agreed as to the facts and issue.

[40] Indeed, the plaintiff's primary contention is that the *Jadual Tiga* — which he had obtained on 13 August 2013 — should take precedence over the grant of probate subsequently issued by the High Court on 10 June 2015 (Issue 3.4, AIT 1).

[41] The invalidity of the will or any lack of testamentary capacity was not pleaded as an alternative cause of action.

[42] If at all the plaintiff had wanted to challenge the will and pray for it to be impugned and set aside, he should have amended his statement of claim (see *Saadian bt Karim v Ong Ting Chai* [1996] 5 MLJ 646; [1996] CLJU 96), and have AIT 1 and AIT 2 broadened to include issues on the validity of the will.

PURPORTED ISSUES ON THE EXISTENCE OF THE WILL AND TESTAMENTARY CAPACITY

[43] In case I am wrong in my views on the purported issues relating to the will and since the parties had expended much time on these matters, I will deal with them before considering the agreed issues.

[44] The solicitor who prepared and attested the will, Chin Tek Ming ('DW3') testified that he had asked the deceased 'to see a doctor to get a certification of his mental condition', after receiving instructions from the deceased to prepare a will for two properties comprising the land and also a parcel of land held under NT213077500 for his nephew, the first defendant.

[45] Subsequently, the deceased produced a letter dated 22 November 2012 from Dr Ahmad Lazuardi bin Jahidin ('DW5') which stated that the deceased 'was still responding well to command, well orientated and well groomed'.

[46] Crescentia Amy Sikawah ('DW4') gave evidence that she translated the will in the Malay language to the deceased who acknowledged that he fully understood the will and its contents before he placed his signature thereon. DW4 also gave evidence that DW3 and his partner then signed on the will as attesting witnesses.

[47] I find that the will was clearly extant and it had been signed by the deceased. It was not a forgery. The first defendant had discharged the burden of proving its due execution by and testamentary capacity of the deceased.

[48] I am mindful that the Federal Court in *Majlis Perbandaran Seberang Perai v Tenaga Nasional Bhd* [2005] 1 MLJ 1; [2004] 4 CLJ 309 took it as settled law 'that where the validity of a will was challenged, the burden of

proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will ...'.

[49] The fact that the deceased excluded the plaintiff, his only child, from his will is on its own insufficient to hold that he lacked testamentary capacity, bearing in mind that the deceased had — prior to making of his will — successfully acted to remove the plaintiff's caveat on the land in respect of which there was a hearing by the ACLR.

[50] There is also, collectively, the evidence of DW3, DW4 and DW5 to show that the plaintiff had testamentary capacity to make the will. They were all independent witnesses who had no relationship with the deceased, apart from crossing paths in the course of work.

[51] The plaintiff argued that since NT 213077500 — the other property mentioned in the will — was no longer registered in the name of the deceased prior to the execution of the will, the deceased 'could have memory lost (sic)' or could not comprehend and appreciate what he wanted to give the first defendant.

[52] There is no evidence of any disorder of the mind or insane delusion which would influence his will to dispose of his property. In *Banks v Goodfellow* [1870] LR 5 QB 549 which was cited with approval by the Federal Court in *Gan Yook Chin & Anor*, Cockburn CJ was of the view that age, disease and an imperfect memory are not what matter but the testator's soundness of mind:

> In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter part may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of.
>
> ...
>
> *But his memory may be very imperfect*; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. *He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will*. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it in writing. (Emphasis added.)

[53] In the instant case, the deceased had the benefit of legal advice from DW3 who ensured he understood the will which was interpreted by DW4.

[54] The deceased also had the benefit of medical evaluation by DW5, whom the first defendant had accompanied the deceased to undergo the mental evaluation.

[55] Although a thorough neurological examination would have been ideal, learned counsel for the second defendant was at pains to point out that in *Randolph Yap Pow Kong & Anor v Yvonne Yap Yoke Sum (f) & Ors* [2011] 3 MLJ 556; [2010] CLJU 684, Ravinthran Paramaguru J (as he then was) held: '... there is no rule of law that only neurologist should be called to certify that someone is sane or of sound disposing mind. Dr Tok who is a qualified physician gave credible and convincing evidence that she had held a conversation with the deceased on general matters for about ten minutes and she was satisfied that he was of sound mind ...'.

[56] DW5 was clear that the deceased 'is well responsive to command, he is well dressed, well groomed and he has no symptom to complain of. During that time, he looks well. Furthermore, he is orientated to time, place and person'.

[57] DW5 went on to aver, under cross-examination that from 'the orientation, the dressing up and the appearance of the patient, I think it is sufficient to tell that his mental condition is quite normal from my observation. It is sufficient to say that his mental health is quite okay', and added:

> To be frank, sincerely when I first examined him I was surprised that with that age 94 years old he impressed me a lot by looking at aspects quick examination of the mental aspect.
>
> No. 1, his tidiness, he is well groom(ed).
>
> No. 2, his age already advancing but yet quite normal for 94 to behave and impress me in that way.

[58] Significantly, there was no rebuttal evidence from any medical witnesses for the plaintiff.

[59] Next, and as noted earlier, the tentative plea that 'the first defendant could have exerted undue influence on the deceased' to make the will is not good enough to support a cause of action.

[60] Even if the plea of undue influence were to be treated as good, it is not an issue agreed between the parties for determination by the court.

[61] Moreover, it has not been made out by the plaintiff on the evidence. **A**

[62] Thus, 'the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will' — as enunciated by the Federal Court in *Gan Yook Chin & Anor* — has not been discharged by the plaintiff. **B**

WHETHER THE JADUAL TIGA TAKES PRECEDENCE

[63] I now turn to consider the plaintiff's contention that because the *Jadual Tiga* was first in time, because it was an order obtained from the Native Court which has co-ordinate jurisdiction with the High Court which only subsequently issued the grant of probate, it would mean that the High Court was no longer seised of jurisdiction to issue the grant of probate which ought to be set aside. **C** **D**

[64] The plaintiff relied on s 1(3) of the Wills Ordinance.

[65] It reads: 'Nothing in this Ordinance contained shall enable any native to dispose of his property by will in a manner *contrary to any law or custom* having the force of law applicable to him at the time of his death. (Emphasis added.)' **E**

[66] The plaintiff argued that the disposal of the land under the will to the first defendant would be contrary to law, because the Native Court had granted the *Jadual Tiga* before the High Court issued the grant of probate. **F**

[67] During oral clarification submissions, it was accepted by the plaintiff that the issue was one of law as there was no custom in issue. **G**

[68] It was thus that the plaintiff sought 'a declaration that when there is already an earlier and existing order for succession of native land vide a *Jadual Tiga* order obtained in the Native Court, a High Court is no longer seised of original jurisdiction to issue a grant of probate for the same land …'. **H**

[69] Both the Native Court and the High Court have jurisdiction over the administration and distribution of native estates. See *Goh Beng Li @ Angeline binti Umpu v Goh Beng Chu @ Mariana binti Umpu* [2018] MLJU 977; [2019] 1 SSLR 339. **I**

[70] As succinctly observed by Justice Wong Siong Tung in *Darius Hoindi*: '… an applicant has a choice whether to resort to the Administration of Native and Small Estates Ordinance (Cap 1) or the Probate and Administration

Ordinance (Sabah Cap 109) for the administration of the estate of a native person'.

[71] The observation is, nonetheless, subject to important qualifications for which it is necessary to refer to ss 3 and 4 of the Administration of Native and Small Estates Ordinance (Sabah Cap 1).

[72] It is also necessary to refer to s 20 (which requires the collector to refer the application of administration and distribution to the Native Court) and s 21 (which requires the Native Court to follow the procedure prescribed by ss 7–18.

[73] Section 3 provides: 'When the owner of any estate has died the executor named in the will of the deceased, or if there is no such executor, any person claiming, under the said will or according to the rules of the distribution of the estate of an intestate applicable in the case of the deceased, to be entitled to the whole or any part of the deceased's estate, or any creditor of the deceased, or any police officer, or where the deceased was a native, the headman of the village in which the deceased resided or owned any property may make an application to the collector for an order for the distribution of the estate or that he may be appointed administrator of the estate'.

WHETHER THE PLAINTIFF HAD LOCUS TO APPLY FOR THE JADUAL TIGA

[74] In considering whether the plaintiff could apply for the *Jadual Tiga*, it is of utmost importance to bear in mind that the deceased had made a will. Since the first defendant was named as the executor in the will, the plaintiff clearly was not a person who could apply for the *Jadual Tiga* under s 3. He could not then ask for declaratory reliefs to uphold the *Jadual Tiga*. So far as the first issue in AIT 2 is concerned, the *Jadual Tiga* was wrongfully obtained and it is clearly void ab initio.

[75] As mentioned earlier, there is no basis to hold that the will was not made; or that it was made by the deceased without testamentary capacity or under undue influence. As the will is not impugned, the consequential question is whether the *Jadual Tiga* may be attacked collaterally on account of the plaintiff's lack of locus standi and also because the first defendant was not given notice of the hearing for the *Jadual Tiga*.

[76] In this regard, s 4 provides: 'If an application under section 3 is made prior to the institution of proceedings under the Probate and Administration Ordinance the Collector of the district where the greater part in value of an estate is situated *shall*, subject to the provisions of this Ordinance, have

exclusive jurisdiction to deal with the whole estate ...'.

WHETHER THERE WAS NOTICE OF HEARING FOR THE JADUAL TIGA

[77] Although the *Jadual Tiga* was first in time and the collector appeared to be vested with exclusive jurisdiction under s 4, the first defendant contended that it was vitiated as there was no notice given to him for the hearing of the *Jadual Tiga* application.

[78] Section 7 prescribes that 'the collector ... shall cause notice of the application in the prescribed form to be exhibited in a conspicuous manner on (the land), or at the District Land Office or other public buildings or places of resort in the district ...'.

[79] Nicholas Sampil @ William (DW2), the former District Officer/ACLR in the District of Penampang, explained the process of giving notice leading up to the issuance of the *Jadual Tiga* in the following manner:

> As provided under section 7 of the Administration of Native and Small Estates Ordinance, upon receiving the Jadual 1 application, the Native Court will then fix a hearing of the application not less than a month thereof and *a notice, known as Jadual 2, will be exhibited for public viewing in the notice board of the District Office or at the notice board of the Native Court, as the case may be, for a period of 30 days*. The purpose of this is so that any interested parties concerning the deceased estate will have notice of the application and to enable them to make their claim or objection accordingly. (Emphasis added.)

[80] The plaintiff produced two letters to suggest that notice of hearing was given to the plaintiff.

[81] One was the *Mahkamah Anak Negeri*'s letter to the first defendant's former solicitors. In that letter dated 3 March 2015, the Native Court stated that it had handled the claims according to its practice and procedure. The *Jadual Satu* had been received and registered. The *Jadual Dua* was said to have been issued on 3 July 2013 which was an announcement for a period of 30 days, to individuals who may have an interest to stake their claims. The hearing took place on 13 August 2013, and the *Jadual Tiga* was issued. The Native Court's letter — which concluded that the *Jadual Tiga* is valid — was signed off by one OKK Bryan M Lojingon.

[82] The other letter was by the district officer Luvita Koisun ('PW2'). It was addressed to the first defendant's former solicitors, and was dated 12 March 2015. PW2 stated that the contents of the letter by OKK Bryan M Lojingon were true.

[83] The first letter has no or little probative value as the maker was not called. The same may be said of the second letter since PW2 was not involved in the process leading up to the alleged issuance of the *Jadual Tiga*. PW2 — who was only appointed as a Native Chief in 2021 — had no personal knowledge of the material facts.

[84] It bears mentioning that a copy of the *Jadual Dua*, the notice, was not produced.

[85] While learned counsel for the plaintiff argued that it is 'sufficient for the same to be exhibited at the notice board of the land office', and DW2 testified that it was the practice to do so, there was no or insufficient evidence that the *Jadual Dua* notice was issued or put up at the District Land Office for any period of time.

[86] Learned counsel for the plaintiff referred to certain passages in DW2's evidence as follows:

> Q: Can you tell the Court what are the methods practiced by the Native Court to serve this Jadual 2?
>
> A: They send using letter and then by word of mouth and through respective Ketua Kampung.
>
> Q: Do you agree that Jadual 2 is actually considered a notice to the public in the event any parties were to make claim or to make objection to Jadual 1 application?
>
> A: Yes.
>
> Q: I put it to you in practice Jadual 2 is usually exhibited at the Notice Board at the District Office or as it is now at the Mahkamah Anak Negeri notice board as notice to the public.
>
> A: It is a practice that this Jadual 2 is displayed exhibited there and also additionally the Ketua Kampung on that particular kampung where the subject matter will be informed.
>
> Q: I put it to you the practice that Jadual 2 is displayed at the notice board is as required under S. 7 of the Administrative of Native and Small Estates. Agree.
>
> A: Agree. I already said just now.

[87] It is doubtful that DW2's evidence can be in any way construed as evidence that the *Jadual Dua* notice was actually issued or put up at the notice board of the District Land Office or alternatively, at the *Mahkamah Anak Negeri*.

[88] I am mindful that the onus of proof is on the first defendant. The Evidence Act, s 102 provides: 'The burden of proof in a suit or proceeding lies

on that person who would fail if no evidence at all were given on either side'. Section 103 goes on to provide that he who asserts must prove: 'The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person'.

[89] The plaintiff relied on s 114(e) and s 114(f) of the Evidence Act 1950 which respectively state that a court may presume that 'judicial and official acts have been regularly performed', and 'the common course of business has been followed in particular cases'.

[90] In this action's previous iteration as Originating Summons No BKI-24NCvC-75/4 of 2019, having been alerted by Justice Wong Siong Tung that there was a substantial dispute of fact as to whether notice or the *Jadual Dua* had been brought to the plaintiff's attention, it is perhaps surprising that the person at the District Land Office/Native Court whose job it was to exhibit such notices was not called as a witness.

[91] Not one of the native chiefs who heard the application for the *Jadual Tiga* was called, and it is not known whether they had scrutinized the evidence and satisfied themselves that the *Jadual Dua* had indeed been issued or posted at the District Land Office for the requisite period.

[92] If at all the *Jadual Dua* notice had in actual fact been issued or put up, DW2 would have said so, and the cross-examination of DW2 was largely on the practice, as opposed to whether the requisite notice was exhibited/served.

[93] It was not only a copy of the *Jadual Dua* that was not produced. The whole file bearing reference MAN 185/2013 can no longer be found. In PW2's words: 'The file may have been lost or sent for storage when the Native Court moved from the Penampang District Office building to its own current building'.

[94] Hence, there was no credible proof that the *Jadual Dua* was issued or actually put up on the notice board. The said Bryan M Lojingon stated in his letter that the *Jadual Dua* was issued on 3 July 2013 but he did not deign it necessary to produce a copy of it, or say that that it was put up on the notice board to give notice to the first defendant. He was not called as a witness, and the omission to mention the putting up of the notice in his letter to the first defendant's former solicitors, is conspicuous by its absence. Saying that a document exists is quite a different matter from saying that it was exhibited on the notice board.

[95] Moreover, DW2 significantly acknowledged as follows: 'The

presentation of the *Jadual Tiga* to me was not being scrutinised properly by me because the amount of work we had in the district office is so much and has no time even to check the nitty gritty of documents presented to me for signing'.

[96] It would appear from DW2's testimony that the process leading up to and including the *Jadual Tiga* was cursory in nature, and it cannot be presumed that all the papers were in order or that the procedure regarding the exhibition of the *Jadual Dua* was followed.

[97] In the upshot, I would not invoke the statutory presumptions vide s 114(e) and s 114(f) of the Evidence Act 1950, as urged by learned counsel for the plaintiff as they are optional and, in any case, rebuttable. See *Loo Keck Leong v Public Prosecutor* [1992] 2 MLJ 177; [1992] 3 CLJ 1332.

[98] All that considered, I find that the first defendant has discharged his burden of showing that it is more probable than not that the *Jadual Dua* was not issued and exhibited/served in accordance with s 7, read together with s 20, of the Administration of Native and Small Estates Ordinance.

CONSEQUENCES OF ABSENCE OF NOTICE

[99] I now turn to consider the consequences where a requisite notice is not given, and the person intended to be notified is deprived of the opportunity of being heard.

[100] In *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374, the appellants were the chargors of a parcel of land in Kedah. The charge bank took out an originating summons to enforce the charge which was served on the appellants. The appellants were, however, not served with a copy of the adjourned hearing. The Federal Court held that where an order is made in the absence of a party who has not been served with notice of hearing, it is a nullity liable to be set aside.

[101] In *Ridge v Baldwin and others* [1963] 2 All ER 66, the House of Lords held that a watch committee's decision, dismissing the appellant as a Chief Constable of Brighton, was null and void. The appellant was not present at the meeting when the decision was made, and he was not given notice of the proposal to dismiss him or particulars of the grounds, or an opportunity of putting his case. It was thus held that there was a breach of the rules of natural justice, specifically that which is given expression in the legal maxim *audi alteram partem* (no man shall be condemned unheard). See *Broom's Legal Maxims* (10th Ed) p 65 et seq: 'It has long been received that no one is to be condemned, punished, or deprived of his property in any judicial proceeding, unless he has had an opportunity of being heard'.

[102] The rule is one of great antiquity, honoured in its observance. In *The King v the Chancellor, Masters, and Scholars of the University of Cambridge* (1723) 92 ER 370; [1723] 88 ER 111, Fortescue J held that '… the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any … even God himself did not pass sentence upon Adam, before he was called upon to make his defence'.

WHETHER THERE MUST BE ACTUAL RECEIPT OF NOTICE

[103] Learned counsel for the first defendant contended that even if one were to assume the *Jadual Dua* notice was exhibited on the notice board of either the District Land Office or at the *Mahkamah Anak Negeri*, this was by itself insufficient for her client had no actual notice of the hearing.

[104] She referred to *Borneo Samudera Sdn Bhd v Uttoh Ajak & Ors; The Assistant Collector of land Revenue, Kinabatangan & Ors (Third Parties)* [2014] CLJU 635.

[105] In that case, Justice Douglas Primus JC accepted that a notice under s 13 of the Land Ordinance was posted on the notice board. As is well known, s 13 imposes a duty on the collector to publish a notice to persons claiming native customary rights over land in respect of which an application is made, and if there is no response within the prescribed deadline, the land may be dealt with or alienated as if no such rights existed. However, His Lordship did not think that the placement of the notice on the notice board was 'sufficient for the purpose of bringing such a notice to the claimants as envisaged in s 13'. He made the observation that 'not all claimants regularly go to the District Office for diverse reasons and some are illiterate. PW6 further said in his witness statement (A14) that in addition to the affixing of the s 13 notice on the notice board he forwarded a copy to the *Ketua Kampung* Batu Putih and the chairman of the JKKK Kinabatangan'.

[106] It will be recalled that the ACLR ('DW2') said it was the practice to put up a *Jadual Dua* notice on the notice board and additionally, also notify the *Ketua Kampung* (presumably of the village where the land is situated). The practice of informing the *Ketua Kampung* shows that there is a real risk that claimants and interested parties may not be aware of such notices even if they were exhibited. It is not known whether such or any *Ketua Kampung* was notified in the instant case for none came to give evidence. It has been a long time since the Administration of Native and Small Estates Ordinance came into force in 1941, and dependence on word of mouth through a Ketua Kampung to give notice to claimants and interested parties may not be ideal when the population has grown substantially.

[107] In *Ng Kon Yu v Sakim bin Saiking & Ors* [2001] 4 MLJ 140; [2001] CLJU 37, Malanjum J (later CJ) expressed his view as follows: 'From the rule on service of notices I think it was the intention of the framer that by all possible means the targets of the notices should be made aware of them. There is nothing in the rules to say that it is sufficient if the notices are pasted in the notice board of the ACLR office. In this case even PW1 acknowledged that it could be possible that the defendants or their predecessors did not know of the notices issued under s 13 of the ordinance in relation to the applications of the vendors. Hence, this is another issue that demands an explanation. *If indeed the defendants were not aware of the notices then there should be no reason for them to lose their right to claim for native customary right over the said lands*. To allow that to happen would be a gross violation of the cardinal principle of natural justice. (Emphasis added.)'

[108] On my part, I do not find it necessary to decide whether the first defendant had actual notice as I have already formed the view that it is more probable than not that the *Jadual Dua* notice was not issued or posted at either the District Land Office or at the *Mahkamah Anak Negeri*, as required statutorily.

[109] In any event, as the law now stands, the first defendant's contention that there must be actual notice is questionable, bearing in mind that the Court of Appeal in *Assistant Collector of Land Revenues & Ors v Alfeus bin Yahsu & Anor and another appeal* [2016] MLJU 1662; [2016] 7 CLJ 848 cited with approval the decision of Rahman Sebli J (as he then was) in *Ensui Gudul @ Godol v Suin @ Abdul Samad bin Dongkiris & Ors* [2011] 3 MLJ 498; [2010] CLJU 943:

> In my view there is no requirement for personal service of the s 13 notice. To construe otherwise would be to read something into s 13 which is not there. The purpose of the notice is to notify the general public (as opposed to any individual person) that an application for alienation has been made and that if any person has any customary rights claim in the land he is to make or send in his statement of claim within the specified period.

[110] Suffice to say that since it is more probable than not that the *Jadual Dua* was not issued or it was not exhibited on the notice board, it would be unjust for the first defendant to lose his rights to the land willed to him.

[111] The court cannot lose sight of the fact that the will was executed by the deceased as a matter of fact, and he had testamentary capacity to do so. The will is not vitiated by undue influence or in any other way.

[112] The *Jadual Tiga* which dealt with the deceased's estate on the basis that he died intestate cannot stand in the way of the will. In this regard, learned counsel for the second defendant submitted, and the court agrees:

By a reading of both the Administration of Native (and Small) Estates Ordinance and the Probate and Administration Ordinance, it is expressly provided under the laws of Sabah that, if a person dies testate ie *leaving a will*, the administration of the estate shall be in accordance to the Will, and only if, only in the event that one dies intestate, that the distribution of the estate shall be in accordance to the rules for distribution of the estate of an intestate applicable ie Intestate Succession Ordinance.

WHETHER THE JADUAL TIGA CAN BE ATTACKED COLLATERALLY

[113] The plaintiff contended that the first defendant should have either appealed against the decision of the Native Court (pursuant to s 23 of the Administration of Native and Small Estates Ordinance (Sabah Cap 1), or applied for revision by the District Native Court (pursuant to s 16 of the Native Courts Enactment 1992).

[114] It was argued for the plaintiff that, in the absence of any appeal to the Native Court of Appeal, the order of distribution under the *Jadual Tiga* as was held in *Saripah Kulah & Ors v Sarabal Alian & Ors* [2013] 2 CLJ 1153, would be conclusive.

[115] The decision in that case may be readily distinguished. There, Lee Heng Cheong JC (later JCA) found that 'the MAN order granted by Semporna Native Court in MAN No 18/94 is not a nullity and consequently, all subsequent transactions and dealings based on the MAN order of Semporna Native Court in MAN No 18/94 namely the immediate transactions based on the MAN order as reflected in Memo No 12003527 dated 2 April 1997, and all subsequent transactions as reflected in Memo No 12003607 dated 26 September 1997, Memo No 121002319 dated 27 January 2011 and Memo No 121002320 dated 27 January 2011 which relied on the said immediate transaction are also valid'.

[116] The plaintiffs in that case had slept soundly on their rights. His Lordship held: 'It is trite that declaratory reliefs are discretionary reliefs and the court shall not grant it as of right. I find that there is a delay of 55 years in petitioning for distribution and another 20 years to challenge the status of the first, second and third defendants as previous registered owners of the said land. I also find that there was no prima facie compelling evidence advanced by the plaintiffs, in the form of affidavits explaining the delay. I also take into consideration of the position of the fifth defendant, who I find, is a bona fide purchaser of the said land for value without notice'.

[117] The facts in the instant case are different, and where notice has not

been given, more so when that omission is in contravention of a statute, it can be set aside in proceedings initiated for that objective.

[118] Here, the first defendant sought a declaration by way of counterclaim so that the issue of the *Jadual Tiga* may be laid to rest, or heard together with the very proceedings that the plaintiff had initiated to set aside the grant of probate and to affirm the validity of the *Jadual Tiga*.

[119] It need not necessarily be impugned by judicial review, or on appeal.

[120] In so holding, this court drew upon *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, where Gopal Sri Ram JCA (as His Lordship then was), sitting in the Federal Court, held:

> ... where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

[121] In *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37, the Federal Court, speaking through Abdoolcader J, held:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent.

WHETHER THE ACLR SHOULD HAVE REFERRED THE APPLICATION FOR JADUAL TIGA TO THE HIGH COURT

[122] Moving on to the next issue, whether the ACLR ought to have referred the application for *Jadual Tiga* to the High Court instead of the *Mahkamah Anak Negeri*, reference has to be made to s 20 of the Administration of Native and Small Estates Ordinance (Sabah Cap 1). It provides:

> When an application under section 3, other than one mentioned in section 24, relates to a native estate the Collector shall refer the application to the native court unless in his opinion the estate is of such magnitude that it should be dealt with under the Probate and Administration Ordinance in which event the Collector shall send the record of the application and his finding to the High Court.

[123] The notes of proceedings clearly show that DW2 did not go through that process. He testified: 'I have never considered this. Because the practice is

as long as there is a *Jadual Tiga* claim, we give it to the Native Court to deliberate and decide'. Similarly, PW2 gave evidence that she as a collector did not go through the prescribed process.

[124] Learned counsel for the first defendant submitted that the ACLR ('DW2') had to but failed to address his mind as to the magnitude of the estate so as to decide whether to remit it to the High Court. She submitted that a failure to do so rendered the *Jadual Tiga* void ab initio. She referred to *Re Three Petitions For Letters of Administration* [1972] 1 MLJ 244 where Lee Hun Hoe J (as His Lordship then was):

> The purpose of (ss 3 and 4 of the Administration of Native and Small Estates Ordinance) is to save costs and provide convenient alternative venues for the rakyat in districts where there are no High Court registries. In other words, in such districts where petitioners apply to the collector for letters of administration, provided that they have not prior to their applications instituted proceedings under the Probate and Administration Ordinance, then the collector would have jurisdiction. Under s 3 those who are entitled to apply to the collector for grant of letters of administration would appear to have a discretion as indicated by the words 'may make an application to the collector. That this is so is made even clearer by s 4'.

[125] Learned counsel for the first defendant thus argued that the intention of the Parliament to allow the distribution of native estates through the collector or Native Court under the Administration of Native and Small Estates Ordinance is to provide convenient alternative venues especially to kampung folks in districts where there are no High Court registries and also to save time and costs. It was thus suggested that the magnitude of the deceased's estate — benchmarked against the sale price of the land to the second defendant 'is more suitable to be dealt under the Probate and Administration Ordinance and have the matter heard in the High Court'.

[126] In this regard, I find it necessary to heed what Lord Campbell LC had to say in *The Liverpool Borough Bank v Turner* [1860] 45 ER 715; [1860] 2 De GF & J 502: 'No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed'.

[127] Having regard to the context of the Administration of Native and Small Estates Ordinance, I find that s 20 is only directory but not mandatory or imperative.

[128] One of the objects is, as Justice Lee Hun Hoe observed, to give access to the applicants in outlying or faraway districts where there are no High Court

registries. The Ordinance came into force on 25 January 1941, at a time when transportation was not readily available in British North Borneo.

[129] I am mindful that the preamble (inserted in 1953) states that the Ordinance is to 'make special provision for the administration of deceased native and small estates', and the term 'native estate' is defined by s 2 as 'the estate in the Colony of a deceased native *irrespective of the value thereof*. (Emphasis added.)'

[130] The ambit of the Ordinance also includes any 'small estate' which, by s 2, is defined as 'the estate in the Colony of a deceased person *other than a native* not exceeding $3,000 in total value at the date of his death ...'. The value was increased to $5,000 in 1960, and has remained static ever since, which means that for practical purposes, the provision for the administration and distribution of small estates by the Native Courts of non-natives is otiose.

[131] Returning to the mainstream, the fact that a Native Court can deal with a deceased native's estate of any size suggests that s 20 only lays out a procedure which is discretionary. More so as there is no provision laying down the consequences of non-compliance.

[132] Moreover, the Legislature could not have intended s 20 to make it mandatory for a collector to first consider whether the magnitude of a native estate requires an application for distribution to be made at the High Court.

[133] Otherwise, every *Jadual Tiga* which has been granted by a collector, without first considering the magnitude of the native estate, would be treated as null and void ab initio, regardless of whether everything else is in order.

[134] In *Montreal Street Rly Co v Normandin* [1917] AC 170, Sir Arthur Channell, in delivering the judgment of the Privy Council, held:

> The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th ed., p. 596 and following pages. *When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only*, the neglect of them, though punishable, not affecting the validity of the acts done. (Emphasis added.)

[135] In the upshot, the collector's failure to consider the magnitude of the

deceased's estate before he sent the plaintiff's application for administration and distribution to the Native Court did not render the *Jadual Tiga* a nullity.

ISSUE OF LIMITATION

[136] I now turn to the plea of limitation which the first and second defendants mounted as a defence.

[137] The first and second defendants' position is that the plaintiff's action was filed more than three years after the cause of action arose.

[138] By item 73 of the Schedule to the Limitation Ordinance (Cap 72), the limitation period of an action to 'cancel or set aside an instrument not otherwise provided for' is three years from the time '(w)hen the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him'.

[139] On that note, time started to run from 7 December 2015. On that day, the first defendant's previous solicitors (Messrs PS Lin Chambers) informed the plaintiff's solicitors (Messrs Maringking & Co) that the High Court had granted the grant of probate and named the first defendant as the executor of the deceased's will. The plaintiff's action was only filed on 14 July 2022.

[140] The first defendant did not specifically plead item 73 whereas the second defendant did so.

[141] The plaintiff argued that the defence of limitation therefore does not avail the first defendant.

[142] The point taken in objection is unmeritorious. The plaintiff was not led astray and could not be said to be prejudiced in any way. The first defendant had pleaded:

> 27. Further or in the alternative, the Plaintiff's claim against the first Defendant is time barred as the Plaintiff had discovered the Grant of Probate was issued to the first Defendant in 2015 vide the letter from Messrs PS Lin & Chambers (the first Defendant's former solicitors) as pleaded in paragraph 23 of the Statement of Claim. The first Defendant shall invoke the relevant provisions of the Limitation Ordinance (Sabah Cap 72) against the Plaintiff's claim as the Plaintiff's claim did not accrue within three (3) years when the cause of action first arises.

[143] While it is true item 73 of the Schedule was not specifically pleaded, there were sufficient details in the plea to alert the plaintiff such as the

limitation period of three years, the date of the plaintiff's discovery of the grant of probate, and the Limitation Ordinance itself.

[144] That puts the first defendant on a much stronger footing than the defendant in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037 which had pleaded: 'defendan sekali lagi mengatakan bahawa tindakan plaintif ini adalah dihalang oleh had masa dan defendan berhak ke atas pembelaan tersebut di sisi undang-undang'.

[145] The Federal Court held that it sufficed for the defendant 'to aver in the defence that the plaintiff's claim is time barred according to law' without specifically mentioning the Limitation Act 1953.

[146] Next, the plaintiff sought to rely on item 112 of the Schedule to the Limitation Ordinance which provides that the period of limitation for possession of immovable property or any interest therein not hereby otherwise specially provided for is 12 years from the date when the possession of the defendant becomes adverse to the plaintiff. However, this is not a case where the plaintiff is seeking the recovery of possessory rights (such as a landlord seeking to recover possession from a tenant who has overstayed) but proprietary or ownership rights through the setting aside of the grant of probate.

[147] Another point taken by the plaintiff is that the defence of limitation does not apply to declarations. Learned counsel for the plaintiff cited *Director of Forests, Sarawak & Anor v Balare Jabu & Ors (suing on behalf of themselves and all other proprietors, occupiers, holders and claimants of native customary rights land (NCR) at and around Long Lamai, Ulu Baram, Sarawak) and another appeal* [2018] supp MLJ 169; [2012] 7 CLJ 685, where the Court of Appeal, speaking through Abdul Wahab Patail JCA, held that while limitation appears to be a complete answer to a suit, it is no answer to a suit for declaratory orders, including a declaration whether the issuance of a licence is subject to Native Customary Rights ('NCR').

[148] The matter then went up to the Federal Court where the sole question in the leave application was '(w)hether the defence of limitation under s 2 of the Public Authorities Protection Act 1948 and/or Sarawak Limitation Ordinance, is an answer to a suit, action, or proceedings for declaration or declaratory orders'.

[149] The Federal Court declined to answer the proposed question of law as the issue of whether each action is time-barred is fact-sensitive, and remitted it to be tried by the High Court which had allowed the striking out application.

See *Director of Forests, Sarawak & Anor v Balare Jabu & Ors (suing on behalf of themselves and all other proprietors, occupiers, holders and claimants of native customary rights land (NCR) at and around Long Lamai, Ulu Baram, Sarawak) and another appeal* [2018] supp MLJ 169; [2012] 7 CLJ 685.

[150] In *Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors* [2014] 1 MLJ 794, the Court of Appeal was of the view that *Balare Jabu* could be distinguished as cl 29(a) of the licence stated that it 'is granted without prejudice to the exercise of any right admitted or privilege conceded to the natives under the Forest Ordinance'.

[151] While the Court of Appeal followed *Balare Jabu* in *CIMB Islamic Trustee Bhd (as the administrator of the estate of Hussein bin Noor, deceased) v Pendaftar Hakmilik Negeri Selangor & Ors* [2021] MLJU 2890; [2022] 4 CLJ 499, it may be said that the facts in those cases are rather different and may be distinguished.

[152] In *Balare Jabu*, the case turned on the licence which was without prejudice to NCR. In the latter case, the Court of Appeal held: 'With respect, we disagree with the learned trial judge that the appellant's action against the first and second respondents is time-barred under PAPA as in this case the act of the first and second respondents is ultra vires the NLC. The act of registering the title No HSD 40222 in the name of Hoo Hwang Boon, instead of Hussein bin Nor who is the rightful owner according to the title No QTR 5371 is ultra vires the NLC in particular the Fourteenth Schedule'.

[153] As may be readily seen, the impugned act in that case was an ultra vires act, and the authority could hardly be allowed to seek refuge under a defence of limitation pursuant to the Public Authorities Protection Act 1948 which, by virtue of s 22, only protects persons acting intra vires in execution of a statutory or other public duty carried out in good faith.

[154] These salient facts are rather different and may be distinguished from those in the instant case.

CONCLUSION

[155] A variety of issues were canvassed, pleaded and unpleaded. To recapitulate, there was no cause of action pleaded to set aside the will and to challenge the deceased's testamentary capacity.

[156] While the court is not persuaded by the first defendant's arguments on the Native Court's purported failure to consider the magnitude of the estate; or that the *Jadual Tiga* ought to be set aside because the first defendant did not

actually receive or know of the *Jadual Dua*, it agrees with the first and second defendants' contention that the plaintiff did not properly obtain the *Jadual Tiga* as: (a) he did not fall within the class of persons who could apply for the *Jadual Tiga* under s 3 of the Administration of Native and Small Estates Ordinance; and (b) the *Jadual Dua* was not issued and even if it was, it was not exhibited on the notice board as required, thus depriving the first defendant of the opportunity of being heard and producing the will to contradict the plaintiff's claim as the beneficiary of the land.

[157] Further, the plaintiff's action is defeated by the plea of limitation put up by the first and second defendants.

[158] I do not, in the circumstances, find it necessary to deal with the issue whether the second defendant is a bona fide purchaser of the land.

[159] The plaintiff's action is dismissed as against all the defendants.

[160] The first defendant's counterclaim is allowed, as a result of which he is granted a declaration that the *Jadual Tiga* is invalid and is to be set aside, and the defendant by counterclaim is to deliver the *Jadual Tiga* to the *Mahkamah Anak Negeri* for cancellation.

[161] The plaintiff is to pay costs of RM12,000 the first defendant, and costs of RM8,000 to the second defendant, with both sets of costs subject to payment of the allocatur fees.

[162] No order as to costs is made for the third and fourth defendants who took no steps in the proceedings, apart from entering appearance, and stating that they would abide by the decision of the court.

Plaintiff's claim dismissed; and first defendant's counterclaim allowed.

Reported by K Selvaraju